TAN SRI MUSA HJ AMAN v. TUN DATUK SERI PANGLIMA HJ JUHAR HJ MAHIRUDDIN & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, KOTA KINABALU
KAMARDIN HASHIM JCA
RHODZARIAH BUJANG JCA
MOHAMAD ZABIDIN DIAH JCA
[CIVIL APPEALS NO: S-01(NCVC)(A)-692-12-2018
& S-01(NCVC)-693-12-2018]
31 DECEMBER 2019

CONSTITUTIONAL LAW: *Executive – Appointment of new Chief Minister – Dismissal of appellants as Chief Minister and Minister of Local Government and Housing of Sabah – Appeal against – Preliminary objection raised – Whether appeal competent – Admission and reliance on fresh evidence on special grounds – – Whether new Chief Minister had majority support of members of State Legislative Assembly – Whether appointment of new Chief Minister constitutional – Whether outcome would have no effect and status quo remained if appeal successful – Whether court would make declaratory judgment when issue in dispute purely academic – Whether issue live issue – Whether appellant met threshold under art. 6(3) of Sabah State Constitution – Rules of the Court of Appeal 1994, r. 7(3A)*

CIVIL PROCEDURE: *Appeal – Competency – Appeal against dismissal of appellants as Chief Minister and Minister of Local Government and Housing of Sabah – Preliminary objection raised – Whether appeal competent – Admission and reliance on fresh evidence on special grounds – Whether even if appeal successful, outcome would have no effect and status quo remained – Whether court would make declaratory judgment when issue in dispute purely academic – Whether issue live issue – Whether appellant met threshold under art. 6(3) of Sabah State Constitution – Rules of the Court of Appeal 1994, r. 7(3A)*

In the 14th General Election ('GE-14') held on 9 May 2018, for the State of Sabah, 60 state constituency seats were offered to be contested for election members of the Sabah State Legislative Assembly ('the State Assembly'). Barisan Nasional of Sabah ('BN-Sabah'), led by Tan Sri Musa Aman ('Tan Sri Musa'), won 29 state constituency seats, including Tan Sri Musa's state constituency of N. 42 Sungai Sibuga. Another coalition led by Datuk Seri Mohd Shafie ('Dato Seri Shafie') made up of Parti Warisan Sabah ('Warisan'), Democratic Action Party ('DAP') and Parti Keadilan Rakyat ('PKR') won 29 state constituency seats. Parti Solidariti Tanah Airku ('STAR') led by Datuk Dr Jeffrey Kitingan won two state constituency seats. Soon after the result of the GE-14 was announced by the Election Commission ('EC'), STAR declared the support for the formation of a coalition government with BN-Sabah. This coalition constituted a simple majority of 31 seats out of 60 seats and it gave Tan Sri Musa the command of majority of the State Assembly. Pursuant to art. 6(3) of the Sabah State Constitution, Tan Sri Musa who commanded a simple majority of the

A members of the State Assembly, was sworn in as the Chief Minister ('CM') by the Governor ('TYT'). The TYT, acting on the advice of Tan Sri Musa, sworn in the State Cabinet pursuant to art. 6(1), 6(2) and 6(3) of the Sabah State Constitution. After the swearing in of the State Cabinet, Tan Sri Musa handed to the TYT six instruments of appointment for the appointment of
B six additional nominated members of the State Assembly and advised the TYT to execute the same pursuant to art. 14(1)(c) of the Sabah State Constitution. However, the TYT refused and did not execute the said instruments. On 12 May 2018, some members of the State Assembly had shifted their allegiance to Datuk Seri Shafie's camp. Tan Sri Musa was
C summoned to the Istana by TYT who asked Tan Sri Musa to resign. Tan Sri Musa refused. Tan Sri Musa further alleged that at no time did he offer, tender or otherwise indicate his resignation as CM and nor did he request a dissolution of the State Assembly. In the affidavit in opposition affirmed by TYT, he stated that he had interviewed the six BN Assemblymen who defected and declared their full support for Datuk Seri Shafie. TYT was
D convinced that the majority of the State Assemblymen had switched their allegiance to Datuk Shafie, who then commanded a simple majority of 35 seats of the State Assembly. TYT averred that in the exercise of his personal discretion conferred under art. 6(4) read together with art. 10(2)(a) of the Sabah State Constitution, the TYT appointed Datuk Seri Shafie as the
E CM of the State of Sabah. TYT informed Tan Sri Musa that since he no longer commanded the confidence of the majority of the members of the State Assembly, he must tender the resignation of the members of the Cabinet which should include himself pursuant to art. 7(1) of the Sabah State Constitution. Tan Sri Musa and Datuk Jahid @ Noordin Jahim ('Datuk
F Jahid') filed originating summons seeking, *inter alia*, a declaration that Tan Sri Musa was and remained the lawful Chief Minister of Sabah and that Datuk Jahid remained the lawful Minister of Local Government and Housing of the Sabah Cabinet. Based on various issues and analyses, the High Court Judge dismissed both originating summonses with costs. Thus, Tan Sri
G Musa's and Datuk Jahid's appeals herein. Before the matter was set for hearing, counsel for Datuk Seri Shafie filed a notice of motion in encl. 25. The application was made under r. 7 of the Rules of Court of Appeal 1994 to move this court for an order, *inter alia*, that the letter issued by the Setiausaha Undangan Negeri Sabah, together with five attached pages
H containing the names of all the Assemblymen, their respective constituencies and political affiliations, be admitted as evidence in this appeal. It was the submission by Dato Seri Shafie that the document was relevant for the ends of justice and would have an impact on the outcome of the appeal. A preliminary objection to the appeal was raised by Dato Seri Shafie on the ground that the appeal was not competent and that it had become academic
I and ought to be dismissed forthwith. In opposing the preliminary objection,

Tan Sri Musa argued that the instant appeal was outside of art. 7(1) of the Sabah State Constitution and that TYT's act in appointing Datuk Seri Shafie was unconstitutional and the issue was very much a live issue.

Held (dismissing appeals)
Per Kamardin Hashim JCA delivering the judgment of the court:

(1) The discretion to admit fresh evidence falls entirely with the court to whom the application was made. This view is fortified by the law and the rules applicable in this jurisdiction. In the exercise of this court's discretion, this court may admit and rely on fresh evidence on special grounds. Since the piece of evidence arose subsequent to the appeal in which case, the application ought to be allowed under r. 7(3A) of the Rules of the Court of Appeal 1994 in that at the hearing before the High Court, the new evidence was not available to the party seeking to use it and that the new evidence, if admitted, would have had a determining influence upon the decision of the High Court. There was merit in the application in encl. 25 to admit fresh evidence. This piece of evidence was of relevance and assistance in this appeal and which was only available after the decision appealed against. Enclosure 25 was therefore allowed. (paras 45, 48, 50 & 51)

(2) Based on the letter dated 3 October 2019 from the Secretary of the State Legislative Assembly, at best Tan Sri Musa could only garner the support of the eight opposition members including himself. Whereas, Datuk Seri Shafie had the support of 52 assemblymen including the nine assemblymen from UMNO who had defected to Warisan and thus Datuk Seri Shafie had the support of more than two-thirds of the members of the State Legislative Assembly. Due to the wide difference in the support between Tan Sri Musa and Datuk Seri Shafie, even if Tan Sri Musa was successful in his appeal, the outcome would have no effect at all on either party. The *status quo* remained and Datuk Seri Shafie would continue to be the CM as he had a large number of assemblymen supporting him. There would be no miscarriage of justice against Tan Sri Musa upon allowing the preliminary objection because it was clear that Tan Sri Musa had lost the confidence of the majority of the members of the State Legislative Assembly thereby triggering art. 7(1) of the Sabah State Constitution. By virtue of art. 7(1) of the Sabah State Constitution, it was mandatory for Tan Sri Musa to tender the resignation of the Cabinet, including the CM himself and by his failure to do so, he was deemed to have vacated the office of the CM. Therefore, it was correct for TYT to exercise his constitutional duty by appointing Datuk Seri Shafie as the CM. (paras 57-60)

(3) The power of the court to make a declaratory judgment is discretionary. The court would not make a declaratory judgment when the issue in dispute was purely academic. The court should not be required to answer academic questions or issues which was no longer a live issue. The declaratory reliefs sought by the appellants were private in law in nature, even though important, but had been overtaken by the subsequent event which rendered the matter academic. Even if Tan Sri Musa was successful in his appeal, the outcome would remain merely academic because Datuk Seri Shafie would still remain as CM because of the majority support he currently enjoyed. (paras 63 & 71)

(4) Although the issues relating to who was the rightful CM of the Sabah State as raised in the projected appeal was significant, it was not of outstanding public importance because even if the projected appeal were to succeed, which was at best from Tan Sri Musa's point of view, that would not make him the new CM again as he did not meet the threshold under art. 6(3) of the Sabah State Constitution. The judge had not erred when she refused the declaratory and injunctive reliefs sought by Tan Sri Musa and Datuk Jahid. This court upheld the preliminary objection raised by the respondent for the issues in dispute between the parties in the projected appeal were academic. (paras 72 & 73)

Case(s) referred to:

Adegbenro v. Akintola [1963] 2 WLR 63 ***(refd)***

Ainsbury v. Millington [1987] 1 All ER 929 ***(refd)***

Bar Council Malaysia v. Tun Dato' Seri Arifin Zakaria & Ors And Another Reference; Persatuan Peguam-peguam Muslim Malaysia (Intervener) [2018] 10 CLJ 129 FC ***(refd)***

Bowman v. Fels [2005] 4 All ER 609 ***(refd)***

Dato' Seri Ir Hj Mohammad Nizar Jamaluddin v. Dato' Seri Dr Zambry Abdul Kadir; Attorney General (Intervener) [2010] 2 CLJ 925 FC ***(refd)***

Datuk (Datu) Amir Kahar Tun Hj Mustapha v. Tun Mohd Said Keruak & Ors [1995] 1 CLJ 184 HC ***(refd)***

Datuk Seri Panglima Mohd Sari Datuk Hj Nuar v. Vee Seng Development Sdn Bhd & Ors [2009] 6 CLJ 102 CA ***(refd)***

Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors and Another Application [1999] 1 CLJ 325 FC ***(refd)***

Hertfordshire Investments Ltd v. Bubb And Another [2000] 1 WLR 2318 ***(refd)***

Husli Mok v. Superintendent Of Lands & Surveys & Anor [2014] 9 CLJ 733 FC ***(refd)***

Hutcheson v. Popdog Ltd [2012] 2 All ER 711 ***(refd)***

Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***

Loknath Padhan v. Birendra Kumar Sahu AIR 1974 SC 505 ***(refd)***

R v. Secretary of State for the Home Department [1999] 1 AC 450 ***(refd)***

Stephen Kalong Ningkan v. Tun Abang Hj Openg and Tawi Sli [1966] 1 LNS 186 FC ***(refd)***

Sun Life Assurance Co of Canada v. Fervis [1944] 1 All ER 469 ***(refd)***

Teoh Kien Peng & Anor v. Thannimalai Subramaniam [2009] 1 LNS 308 CA ***(refd)***

Tun Datu Hj Mustapha Datu Harun v. Tun Datu Hj Mohamed Adnan Robert, Yang di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (No. 2) [1986] 1 LNS 136 ***(refd)***

Legislation referred to:
Constitution of the State of Sabah, arts. 6(1), (2), (3), (7), 7(1), 10(2)(a), (4), 14(1)(c)
Courts of Judicature Act 1964, s. 69
Rules of Court 2012, O. 33 r. 2
Rules of the Court of Appeal 1994, r. 7(3), (3A)

(Civil Appeal No: S-01(NCVC)(A)-692-12-2018)
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For the 1st respondent - Zaleha Rose Pandin, Nor Asiah Mohd Yusof, Dayang Ku Fazidah Hatun Pangeran Bagul & Rafidah Maqbool Rahman; State Legal Advisor, Sabah
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[Editor's note: For the High Court judgment, please see Tan Sri Musa Hj Aman v. Tun Datuk Seri Panglima Hj Juhar Hj Mahiruddin & Anor And Another Case [2019] 2 CLJ 813 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Kamardin Hashim JCA:

Introduction

[1] Both these appeals were filed by the appellants/plaintiffs against the decision of the High Court at Kota Kinabalu given on 7 November 2018, in dismissing the appellants/plaintiffs' claim in both the originating summons with costs. Both the appeals were heard together by us as all the issues were interrelated. Both appeals emanate from the dismissal of Tan Sri Musa bin Haji Aman ('Tan Sri Musa') as the Chief Minister ('CM') of the State of Sabah by the Governor ('the TYT'). The common issue in both appeals is the constitutionality of the appointment of Datuk Seri Mohd Shafie bin Haji Apdal ('Datuk Seri Mohd Shafie') as the new CM to replace Tan Sri Musa and in the second appeal by Datuk Jahid @ Noordin bin Jahim ('Datuk Jahid'), is also challenging his dismissal as Minister of Local Government and Housing.

[2] We heard the appeal by Tan Sri Musa first. As agreed by parties from the beginning at the court below, the outcome of the appeal by Tan Sri Musa will finally determine the second appeal by Datuk Jahid.

[3] We heard the appeal on 28 November 2019 whereby after hearing the parties on all the issues raised, we unanimously dismissed both appeals with costs. We now give our reasons for doing so.

Background Facts

[4] The undisputed background facts were well encapsulated in the learned trial judge's judgment. We reproduce them with certain modifications below.

[5] In the 14th General Election ('GE-14') held on 9 May 2018, for the State of Sabah, 60 state constituency seats were offered to be contested for election of members of the Sabah State Legislative Assembly ('the State Assembly'). The result of the GE-14 was as follows:

(i) Barisan Nasional of Sabah ('BN-Sabah') led by Tan Sri Musa, which is a coalition of eight political parties, namely, United Malay National Organisation ('UMNO'), Parti Bersatu Sabah ('PBS'), United Pasokmomogon Kadazandusun Murut Organisation ('UPKO'), Liberal Democratic Party ('LDP'), Parti Bersatu Rakyat Sabah ('PBRS'), Malaysian Chinese Association ('MCA'), Parti Gerakan Rakyat Malaysia ('Gerakan') and Malaysian Indian Congress ('MIC'), won 29 state constituency seats, including Tan Sri Musa's state constituency of N.42 Sungai Sibuga.

(ii) Another coalition led by Datuk Seri Mohd Shafie, made up of Parti Warisan Sabah ('Warisan'), Democratic Action Party ('DAP') and Parti Keadilan Rakat ('PKR'), won 29 state constituency seats, with Warisan winning 21 seats, DAP winning six seats and PKR winning two seats.

(iii) Parti Solidariti Tanah Airku ('STAR') led by Datuk Dr Jeffrey Kitingan won two state constituency seats.

[6] On 9 May 2018, soon after the result of the GE-14 was announced by the Election Commission (EC), STAR declared its support for the formation of a coalition government with BN-Sabah. This coalition constituted a simple majority of 31 seats out of 60 seats and it gave Tan Sri Musa the command of majority of the State Assembly.

[7] Pursuant to art. 6(3) of the Sabah State Constitution, on 10 May 2018 at about 11pm, Tan Sri Musa who commanded a simple majority of the members of the State Assembly, was sworn in as the CM by the TYT. The swearing-in ceremony was witnessed by the then Chief Justice of Sabah and Sarawak and in the presence of the State Secretary, the State Attorney General and other state dignitaries, government officials and invited guests.

[8] Immediately after Tan Sri Musa was sworn in as the CM, the TYT acting on the advice of Tan Sri Musa in his capacity as CM, sworn in the State Cabinet pursuant to arts. 6(1), 6(2) and 6(3) of the Sabah State

Constitution. The ceremony was also witnessed by the then Chief Justice of Sabah and Sarawak and in the presence of the State Secretary, the State Attorney General and other state dignitaries, government officials and invited guests.

[9] After the swearing-in of the State Cabinet, Tan Sri Musa handed to the TYT six instruments of appointment for the appointment of six additional nominated members of the State Assembly and advised the TYT to execute the same pursuant to art. 14(1)(c) of the Sabah State Constitution. However, the TYT refused and did not execute the said Instruments.

[10] What transpired on 12 May 2018 at about 10am was news that some members of State Assembly from UPKO had shifted their allegiance to Datuk Seri Mohd Shafie's camp. Later that day, Tan Sri Musa was summoned to the Istana by the TYT. At the meeting the TYT asked Tan Sri Musa to resign as CM. Tan Sri Musa refused to resign and instead he insisted that the TYT executed the six instruments of appointment. It was alleged by Tan Sri Musa that the TYT told him "whether you resign or not, I am going to swear in Shafie at 9pm tonight." Tan Sri Musa further alleged that at no time did he offer, tender or otherwise indicate his resignation as CM and nor did he request a dissolution of the State Assembly.

[11] In the affidavit in opposition affirmed by the TYT, he stated that he had interviewed the six BN Assemblymen who defected and who had signed their respective statutory declarations in that they had declared and affirmed their full support for Datuk Seri Mohd Shafie. The TYT was convinced that the majority of the State Assemblymen had on 11 May 2018 switched their allegiance to Datuk Seri Mohd Shafie, who then commanded a simple majority of 35 seats of the State Assembly. Hence, pursuant to art. 7(1) of the Sabah State Constitution, the TYT summoned Tan Sri Musa to the Istana on 12 May 2018 at 10.05am and asked him to tender his resignation as CM together with his Cabinet members. When Tan Sri Musa refused, the TYT averred that in exercise of his personal discretion conferred under art. 6(3) read together with art. 10(2)(a) of the Sabah State Constitution, the TYT appointed Datuk Seri Mohd Shafie as the CM of the State of Sabah on the night of 12 May 2018.

[12] By a letter dated 12 May 2018, the TYT informed Tan Sri Musa that since he no longer commanded the confidence of the majority of the members of the State Assembly, he must tender the resignation of the members of the Cabinet which should include himself pursuant to art. 7(1) of the Sabah State Constitution. The letter was only served on the Tan Sri Musa's representative cum confidential secretary on 14 May 2018.

[13] On 26 May 2018, upon the advice of Datuk Seri Mohd Shafie, the TYT appointed the other members of the State Cabinet. The swearing-in ceremonies were witnessed by the then Chief Justice of Sabah and Sarawak, the state officials and invited guests.

The Prayers

[14] On 4 June 2018, Tan Sri Musa filed the originating summons against the TYT and Datuk Seri Mohd Shafie seeking the following reliefs:

(a) A declaration that the Plaintiff is and remains the lawful Chief Minister of Sabah;

(b) A declaration that there was no revocation, removal or dismissal of the Plaintiff's appointment as Chief Minister of Sabah;

(c) A declaration that the 1st Defendant's act or acts subsequent to the Plaintiff's appointment as Chief Minister with respect to the 2nd Defendant's purported appointment as Chief Minister are *ultra vires* the Constitution of the State of Sabah (the 'State Constitution'), are null and void and of no effect;

(d) A declaration that the 1st Defendant acted unconstitutionally in appointing the 2nd Defendant's State Cabinet;

(e) A declaration that the 1st Defendant's failure, neglect and/or refusal to appoint the Plaintiff's 6 nominated Assemblymen as advised by the Plaintiff was contrary to the State Constitution;

(f) A declaration that all acts and things done by the 2nd Defendant and/or his purported Cabinet after his purported appointment as the purported Chief Minister are null, void and of no effect;

(g) Damages against the 1st and 2nd Defendants to be assessed;

(h) Discretionary interest of 5% p.a. pursuant to Section 11 of the Civil Law Act, 1956 on the Judgment sum from the filing of the Writ until the date of Judgment and Statutory interest of 5% p.a. from the date of Judgment until the date of full realisation;

(i) Costs;

(j) Such further or other reliefs that this Honourable Court deems fit and proper to grant.

[15] On 6 June 2018, Datuk Jahid filed the originating summons against Datuk Seri Mohd Shafie and two others seeking the following reliefs:

(a) A declaration that Tan Sri Musa Haji Aman is and remains the lawful Chief Minister of Sabah;

(b) A declaration that the Plaintiff is and remains the lawful Minister of Local Government and Housing of the Sabah Cabinet;

(c) A declaration that the 1st Defendant's alleged swearing-in and appointment as the purported Chief Minister of Sabah is *ultra vires* the Constitution of the State of Sabah and is unlawful, null and void and of no effect;

(d) A declaration that the alleged appointment of the purported additional State Legislative Assemblymen nominated by the 1st Defendant as the purported Chief Minister of Sabah is unlawful, null and void and of no effect;

(e) A declaration that the swearing-in and appointment of the alleged Ministers and Assistant Ministers of the purported Sabah Cabinet nominated by the 1st Defendant as the purported Chief Minister of Sabah is unlawful, null and void and of no effect;

(f) A declaration that all acts and things done by the 1st Defendant and/or his purported Sabah Cabinet after his and their purported appointments as the purported Chief Minister and purported Cabinet Ministers and Assistant Ministers are unlawful, null and void and of no effect;

(g) An injunction restraining the 1st Defendant whether by himself and or others claiming under him from holding out as the purported Chief Minister of Sabah and or as purported Sabah Cabinet Ministers and Assistant Ministers and further restraining the 1st Defendant from undertaking any duties, responsibilities, functions activities or positions as the purported Chief Minister of Sabah;

(h) An injunction restraining the 2nd Defendant whether by himself and or others claiming under him from holding calling and or convening any Meeting, Session and or Sitting of the State Legislative Assembly of Sabah where advised by the 1st Defendant as the purported Chief Minister of Sabah and or any person claiming under him until the final disposal of the Originating Summons herein and or until further Orders of this Honourable Court;

(i) An injunction restraining the 3rd Defendant whether by himself and or others claiming under him from holding calling and or convening any Meeting, Session and or Sitting of the State Legislative Assembly of Sabah where advised by the 1st and 2nd Defendants as the purported Chief Minister of Sabah or the Speaker of the Legislative Assembly and or any person claiming under them until the final disposal of the Originating Summons herein and or until further Orders of this Honourable Court;

(j) Damages against the 1st Defendant to be assessed;

(k) Discretionary interest of 5% p.a. pursuant to Section 11 of the Civil Law Act, 1956 on the Judgment sum from the filing of the Writ until the date of Judgment and Statutory interest of 5% p.a. from the date of Judgment until the date of full realisation;

(l) Costs;

(m) Such further or other reliefs that this Honourable Court deems fit and proper to grant.

A **At The High Court**

[16] At the High Court, the learned High Court Judge ('learned judge') addressed the following six main and related issues to be decided by Her Ladyship, namely:

B (i) whether the TYT was acting within his constitutional power when he purportedly dismissed Tan Sri Musa as CM;

(ii) whether the TYT's appointment of Datuk Seri Mohd Shafie as the CM is *ultra vires*, null and void;

C (iii) whether Tan Sri Musa had lost the confidence of the majority of the State Assembly;

(iv) whether a vote of no-confidence is the only way to determine that Tan Sri Musa has lost the confidence of the majority of the members of the State Assembly;

D (v) whether there is extraneous resource in support of Tan Sri Musa's loss of confidence of the majority of the members of the State Assembly; and

(vi) whether, by Tan Sri Musa's refusal to resign, he is deemed to have vacated the CM post.

E **[17]** With regard to issues (i) and (iii), the learned judge had after considering arts. 6 and 7 of the Sabah State Constitution, found that no single political party had won a majority of the elected seats of the State Assembly in GE-14 and because of that, no leader of any party can claim that he is likely to command the confidence of the majority of the members of the State F Assembly. Therefore, cl. (7) of art. 6 of the Sabah State Constitution does not come into play and was not applicable when the TYT exercised his discretion under art. 6(3) of the Sabah State Constitution.

[18] For ease of reference, we reproduce art. 6 and art. 7 of the Sabah State Constitution as follows:

G 6. (1) There shall be a State Cabinet to advise the Yang di-Pertua Negeri in the exercise of his functions.

(2) The Cabinet shall consist of Chief Minister, and not more than ten nor less than four other members, (to be styled "Minister") appointed in accordance with clause (3).

H (3) The Yang di-Pertua Negeri shall appoint as Chief Minister a member of the Legislative Assembly who in his judgment is likely to command the confidence of a majority of the members of the Assembly and shall appoint the other members mentioned in clause (2) in accordance with the advice of the Chief Minister from among the members of the Assembly:

I Provided that if an appointment is made while the Legislative Assembly is dissolved a person who was a member of the last Assembly may be appointed but shall not continue to hold office after the first sitting of the next Legislative Assembly unless he is a member thereof.

(4) Notwithstanding anything in this Article, a person who is a citizen by naturalisation shall not be appointed Chief Minister.

(5) The Chief Minister shall not hold any office of profit and shall not actively engage in any commercial enterprise.

(6) The Cabinet shall be collectively responsible to the Legislative Assembly.

(7) For the purpose of clause (3) of this Article, where a political party has won a majority of the elected seats of the Legislative Assembly in a general election, the leader of such political party, who is a member of the Legislative Assembly shall be the member of the Legislative Assembly who is likely to command the confidence of the majority of the members of the Assembly.

7. (1) If the Chief Minister ceases to command the confidence of a majority of the members of the Legislative Assembly, then, unless at his request the Yang di-Pertua Negeri dissolves the Assembly, the Chief Minister shall tender the resignation of the members of the Cabinet.

(2) A member of the Cabinet may at any time resign his office by writing under his hand addressed to the Yang di-Pertua Negeri, and a member of the Cabinet other than the Chief Minister shall also vacate his office if his appointment thereto is revoked by the Yang di- Pertua Negeri acting in accordance with the advice of the Chief Minister.

(3) Subject to clauses (1) and (2), a member of the Cabinet other than the Chief Minister shall hold office at the pleasure of the Yang di-Pertua Negeri.

[19] On the same two issues, the learned judge further decided that Tan Sri Musa's argument that he could still continue as CM even after the defection of the six State Assemblymen of BN-Sabah because it still retained 23 State Assemblymen compared to the 21 State Assemblymen of Warisan is untenable. With the defection of the six State Assemblymen from BN-Sabah, the coalition led by Datuk Seri Mohd Shafie was increased from 29 to 35 whereas BN-Sabah's State Assemblymen dropped from 29 to 23. This clearly shows that Tan Sri Musa had lost the confidence of the majority of the elected members of the State Assembly.

[20] As to issue (iv), the learned judge agreed with the submission of counsel acting for the TYT and for Datuk Seri Mohd Shafie that a no-confidence vote by the members of the State Assembly is not the only way to determine that Tan Sri Musa has lost the confidence of the majority of the members of the State Assembly. The learned judge held that the TYT can form his own judgment by relying on extraneous sources as decided by the Federal Court in the case of *Dato' Seri Ir Hj Mohammad Nizar Jamaluddin v. Dato' Seri Dr Zambry Abdul Kadir; Attorney General (Intervener)* [2010] 2 CLJ 925; [2010] 2 MLJ 285 ('the *Perak*'s case').

[21] The learned judge rejected learned counsel for Tan Sri Musa argument that the court should follow the decision in *Stephen Kalong Ningkan v. Tun Abang Hj Openg and Tawi Sli* [1966] 1 LNS 186; [1966] 2 MLJ 187 ('*Stephen Kalong Ningkan*'s case') and *Tun Datu Hj Mustapha Datu Harun v. Tun Datu Hj Mohamed Adnan Robert, Yang di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (No. 2)* [1986] 1 LNS 136; [1986] 2 MLJ 420 ('*Tun Datu Hj Mustapha*'s case') instead of the Perak's case notwithstanding that art. XVI(6) of the Perak State Constitution is in *pari materia* with art. 7(1) of the Sabah State Constitution.

[22] Further, the learned judge relied on the case of *Datuk (Datu) Amir Kahar Tun Haji Mustapha v. Tun Mohd Said Keruak & Ors* [1995] 1 CLJ 184; [1995] 1 MLJ 169 ('*Amir Kahar*'s case'). In *Amir Kahar*'s case, Datuk Joseph Pairin Kitingan ('Datuk Pairin') was appointed as CM of Sabah. On the advice of Datuk Pairin, other elected members from his party, including the plaintiff, were appointed to form the State Cabinet. Subsequently, due to defection of three members of the Assembly from his party to the opposition, Datuk Pairin requested the first defendant who was the Governor to dissolve the Assembly but the first defendant withheld the consent. Datuk Pairin subsequently tendered his resignation as Chief Minister, but he did not tender the resignation of the other members of his Cabinet. Thereafter the first defendant appointed the second defendant as a new Chief Minister to replace Datuk Pairin. The first defendant, acting on the advice of the new Chief Minister, appointed the third to ninth defendants as the other members of the Cabinet of the second defendant. The plaintiff sought the declaration, *inter alia*, that since no motion of no confidence was ever tabled in the Assembly against Datuk Pairin, his resignation was personal to him and did not affect the appointment of the plaintiff as a Deputy Chief Minister and Minister of Agriculture and Fisheries.

[23] Learned judge adopted the view of Abdul Kadir Sulaiman J (as he then was) in *Amir Kahar*'s case where His Lordship opined that a vote in the State Assembly is not the only means to determine the confidence of the members of the Assembly in the CM but depends on the circumstances. Other extraneous matters could provide sufficient evidence to establish the fact of the CM ceasing to command the confidence of a majority of the members of the State Assembly for the purpose of art. 7(1) of the Sabah State Constitution.

[24] The same approach of constitutional interpretation was taken by the Federal Court in the *Perak'*s case where Arifin Zakaria CJ (Malaya) (as he then was) said at p. 941 (CLJ); p. 299 (MLJ):

> [26] *NS Bindra*'s *Interpretation of Statutes*, (10th Ed) at p. 1295 speaks of two theories of interpretation of Constitution namely, the mechanical and organic theories. At p 1296 it stated that the organic method is to be

preferred. 'The organic method requires us to see the present social conditions and interpret the Constitution in a manner so as to resolve the present difficulties'. From the authorities cited above our courts are inclined to the organic theory in the interpretation of the Constitution.

[27] One other important guide in interpretation of Constitution is that, 'The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established canon of constitutional construction that no one provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument. An elementary rule of construction is, that if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous.

(See *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 1 CLJ 701; [2004] 2 MLJ 257).

[25] In the *Perak*'s case, the Federal Court in dismissing the appellant's appeal had decided that there is nothing in art. XVI(6) of the Perak State Constitution which is *pari materia* to art. 7(1) of the Sabah State Constitution, or in any other provisions stipulating that the loss of confidence in the CM can only be established through a vote of no confidence in the State Assembly. Evidence of loss of confidence in the CM may be gathered from other extraneous sources but provided they are properly established. In the present appeal before us, the source was based on the TYT's personal interview of the six BN-Sabah Assemblymen who defected and the six statutory declarations executed by them which declared and affirmed their full support for Datuk Seri Mohd Shafie to be as CM. By then, Datuk Seri Mohd Shafie commanded a simple majority of 35 seats out of 60 seats of the State Assembly.

[26] Learned judge further held that it is crystal clear from the decision of the apex court in the *Perak*'s case that there is no mandatory requirement for a motion of no confidence to be passed in the State Assembly against the CM before he ceases to command the confidence of the majority members of the Assembly. There is no express provision that there must be such motion in the relevant art. XVI(6) of the Perak State Constitution as well in the art. 7(I) of the Sabah State Constitution.

[27] Although the facts in the *Perak*'s case are not identical with the present appeal before us and there is no similar provision in Perak State Constitution as art. 10(4) of the Sabah State Constitution, nevertheless the learned judge was of the view that they do not render the principles established inapplicable to the present dispute as the issue raised concerned the interpretation of art. XVI(6) which is *pari materia* or identical to art. 7(I) of the Sabah State Constitution in determining the same issue as to who was the legitimate CM.

[28] With regard to the issue at (v), whether there is extraneous evidence in support of Tan Sri Musa's loss of confidence of the majority of the members of the State Assembly, it was argued by learned counsel for Tan Sri Musa that there must be either an admission by Tan Sri Musa, the incumbent CM of loss of confidence of the majority as in the *Perak*'s case or in *Ningkan*'s case and that there were unambiguous and consistent statements by the Assemblymen that the CM has lost their support. It was submitted further that in the present case, Tan Sri Musa never requested for a dissolution of the State Assembly nor did he expressly admit that he had lost the confidence of the majority Assemblymen. Learned judge did not agree with the learned counsel's said submission and contention.

[29] Her Ladyship relied on *Adegbenro v. Akintola* [1963] 2 WLR 63 which was followed by the learned judge in the *Amir Kahar*'s case at p. 194 which held:

> The fact of a Chief Minister ceasing to command the confidence of a majority of the members of the Assembly can be evidenced by various situations and circumstances. It can be through the knowledge of the Chief Minister himself from the surrounding circumstances or it can be through the actual voting in the Assembly by its members. The lists are not by any means exhaustive. There is nowhere in the constitution to say that the only evidence of such fact must be through the actual vote in the Assembly.

[30] The learned judge was of the view that although Tan Sri Musa did not request for the dissolution of the State Assembly nor did he even admitted loss of confidence of the majority during the audience with the TYT on the 12 May 2018, the TYT can reasonably rely on the six statutory declarations [exhs. TYT-3 to TYT-8 of encl. 8] to form a judgment that Tan Sri Musa had lost the confidence of the majority of the members of the State Assembly.

[31] Regarding the issue at para. (vi) as to whether by Tan Sri Musa's refusal to resign, he was deemed to have vacated the CM's post, the learned judge again relied on the principles of law in the *Perak*'s case which upon application to the present dispute, means:

(i) That the word "shall" in art. 7(1) of the Sabah State Constitution should be given a mandatory effect and it was incumbent, therefore, on Tan Sri Musa who having lost the confidence of the majority of the members of the State Assembly, to tender his resignation of the State Cabinet. The term 'Cabinet' includes the CM. Tan Sri Musa refused after being requested by the TYT to do so clearly went against the express provisions of art. 7(1).

(ii) Since Tan Sri Musa refused to tender his resignation of the State Cabinet under art. 7(1), he and the members of the State Cabinet are deemed to have vacated their respective offices, paving way for the new State Cabinet to be formed.

[32] Following the *Amir Kahar*'s case, the learned judge held that the dissolution of the State Cabinet under art. 7(1) does not involve the TYT or necessarily, the members of the State Assembly. The learned judge further held that the issue whether the TYT had acted *ultra vires* by dismissing Tan Sri Musa as CM does not arise by reason that Tan Sri Musa is deemed to have vacated his post when he refused to tender his resignation after having ceased to command the confidence of the majority of the members of the State Assembly of Sabah.

[33] Now on to the final issue discussed by learned judge at para. (ii) as to whether the appointment of Datuk Seri Mohd Shafie as CM was *ultra vires*, null and void. Relying on the *Perak*'s case and the *Amir Kahar*'s case which decisions were later upheld by the Federal Court, the learned judge's answer to this final issue is in the negative. As Tan Sri Musa and his State Cabinet were deemed to have vacated their respective posts, it paved the way for the TYT to appoint Datuk Seri Mohd Shafie as the CM of the State of Sabah to replace Tan Sri Musa. This was pursuant to art. 6(3) of the Sabah State Constitution. Further, as Tan Sri Musa was deemed to have vacated the post of CM, the appointment of Datuk Seri Mohd Shafie as the new CM does not give rise to a preposterous situation of two CMs for the State of Sabah.

[34] Besides these issues discussed above, the learned judge had considered the other three side issues, namely, (i) whether the TYT's exercise of power under art. 6(3) of the Sabah State Constitution to appoint the CM is non-justiciable, (ii) whether the TYT's failure to appoint the six nominated members upon Tan Sri Musa's advice, he lost the majority, and (iii) whether the dispute raised by Tan Sri Musa is academic.

[35] On the first issue, the learned judge agreed with learned counsel for the TYT's argument that the repository power of the TYT to appoint the CM or to withhold the pleasure contemplated in art. 6(3) of the Sabah State Constitution are exclusive pleasure-cum-discretion of the TYT. This exercise of discretion is an absolute exercise of a prerogative power. As it is the sole and exclusive authority of the TYT to appoint the CM, it cannot be questioned in any court of law.

[36] On the refusal of the TYT to appoint six nominated members as requested by Tan Sri Musa, the learned judge disagreed with learned counsel that was the reason Tan Sri Musa had lost the majority. It was clear from the *Tun Mustapha*'s case that the six appointed members cannot constitutionally be taken into consideration for inflating a seat of a party having a minority of elected seats in order to secure a majority over a party with the majority of elected seats. If it is so, then such a judgment would not be in accordance with the requirements of art. 6(3) of the Sabah State Constitution.

[37] On the academic issue, it was raised by learned counsel for Datuk Seri Mohd Shafie that at the first sitting of the State Legislative Assembly on 11 June 2018, 44 of the State Assemblymen present had pledged and declared their support for Datuk Seri Mohd Shafie. It was submitted that the dispute was clearly no longer a live issue but has become academic. Regardless of the outcome of the OS, Datuk Seri Mohd Shafie will remain and will continue to be the CM.

[38] The learned judge relied on the exception as stated in *R v. Secretary of State for the Home Department* [1999] 1 AC 450 which was referred to by learned counsel for Tan Sri Musa, and learned judge had decided that it does not render the dispute before the court academic as it involves a constitutional issue pertaining to the appointment of CM which is of high public interest that the court should deliver a ruling on it to settle the issue of the interest of the public.

[39] On the final analysis, based on various issues discussed above by the learned judge, Her Ladyship dismissed both OS with costs. Thus, Tan Sri Musa's and Datuk Jahid's appeals before us.

Second Respondent's Notice Of Motion

[40] On 20 November 2019 before the matter was set for hearing, learned counsel for Datuk Seri Mohd Shafie filed a notice of motion in encl. 25 and this was fixed for hearing on 28 November 2019, the same date fixed for the hearing of this appeal. The application was made under r. 7 of the Rules of the Court of Appeal 1994 to move this court for an order:

(i) that the letter issued by Shafaruddin bin Halide, the Setiausaha Undangan Negeri Sabah dated 3 October 2019 together with the five attached pages containing the names of all the Assemblymen, their respective constituencies and political affiliations be admitted as evidence in this appeal;

(ii) the costs of this application be costs in the cause; and

(iii) such further relief or other order or relief which this Honourable Court deems fit and just.

[41] The application was supported by an affidavit in support sworn and affirmed by Douglas Lind of Messrs Lind Willie Wong & Chin, counsel for Datuk Seri Mohd Shafie on the 18 November 2019 at Kota Kinabalu, Sabah. The letter dated 3 October 2019 from the Secretary to the State Legislative Assembly was exhibited in the affidavit in support as exh. "DL-1". Attached to it was the 'Senarai Parti Yang Dianggotai Oleh Ahli Dewan Undangan Negeri Sabah Kelima Belas' ('the Senarai').

[42] There was no affidavit in opposition filed by neither Tan Sri Musa nor by Datuk Jahid. During the hearing of the application, we were told that learned counsel for both the appellants will only oppose the application solely base on points of law and procedures. Learned counsel for Tan Sri Musa raised an objection from the Bar that the deponent of the affidavit in support did not show that he had personal knowledge of the Senarai. Therefore, he submitted the affidavit in support was defective. Learned counsel as well argued that the application was not *bona fide* as it was filed very late even though the Senarai was available as early as October 2019. This, according to learned counsel was calculated as an attempt to scuttle the appellant's appeal.

[43] In reply, learned counsel for Datuk Seri Mohd Shafie said that everyone had knowledge about the current standings of all the 60 members of the Sabah State Assembly. Learned counsel argued that he affirmed the affidavit in support not to verify the facts but rather the production of the letter and the Senarai which was verified by the Secretary to the Sabah State Assembly. On the allegation that the move was to scuttle the appellant's appeal, learned counsel rebuke the allegation by saying that the document was very relevant for the ends of justice and will have an impact on the outcome of the appeal on the point raised by the respondents that the appeals were redundant and academic. Learned counsel cited the case of *Datuk Seri Panglima Mohd Sari Datuk Hj Nuar v. Vee Seng Development Sdn Bhd & Ors* [2009] 6 CLJ 102; [2009] 2 MLRA 349, which was a decision of this court.

[44] The jurisprudence to admit fresh evidence begins with the often-cited case of *Ladd v. Marshall* [1954] 3 All ER 745; [1954] 1 WLR 148 where Lord Denning laid down the principles for the reception of fresh evidence in this way:

> In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[45] Subsequently, the approach by the Malaysian court was that all the three conditions stipulated in *Ladd v. Marshall (supra)*, are to be read cumulatively and not disjunctively. Meaning, if any party fails to satisfy any one of the condition, he fails altogether. Although we agree that the conditions are cumulative but it must be emphasised that the discretion to admit fresh evidence falls entirely with the court to whom the application is made. Our view is fortified by the law and the rules applicable in our jurisdiction. This is because of the r. 7(3A) of the Rules of the Court of Appeal 1994 and the decision of this court in *Teoh Kien Peng & Anor v. Thannimalai Subramaniam* [2009] 1 LNS 308.

[46] Section 69 of the Courts of Judicature Act 1964 (Act 91) (Revised 1972) states as follows:

69. Hearing of appeals

(1) Appeals to the Court of Appeal shall be way of re-hearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.

(2) The further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.

(3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.

(4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

(5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties, although the respondents or parties have not appealed from or complained of the decision.

[47] Rule 7 of the Rules of the Court of Appeal 1994 provides as follows:

7. Power of Court to amend, admit further evidence, or draw inference of fact

(1) The Court shall have all the powers and duties, as to amendment or otherwise, of the appropriate High Court, together with full discretionary power to receive further evidence by oral examination in Court, by affidavit, or by the deposition taken before an examiner or Commissioner.

(2) Such further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.

(3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters subsequent aforesaid, shall be admitted on special grounds only, and not without leave of the Court.

(3A) At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that:

(a) At the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and

(b) The new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court, as the case may be.

(4) The Court may draw inference of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

(5) The powers aforesaid may be exercised notwithstanding that the notice of appeals relates only to part of the decision, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties have not appeal from or complained of the decision.

[48] In exercise of our discretion, we may admit and rely on the fresh evidence on special grounds under r. 7(3) of the Rules of the Court of Appeal 1994. What constitute special grounds had been discussed by Hale LJ in *Hertfordshire Investments Ltd v. Bubb And Another* [2000] 1 WLR 2318. This was what His Lordship Hale LJ said:

> Special grounds, as we all know, meant that the fresh evidence satisfied the principles in *Ladd v. Marshall* [1954] 1 WLR 1489: that is, that it could not have been obtained with reasonable diligence for use at trial; if given it would probably have had an important influence on the result of the case; and it is apparently credible although not incontrovertible; although there are exceptional cases in which those principles do not apply, for examples those involving the welfare of children.
>
> There are, of course, strong reasons for this approach, which has a long pedigree. It is in the interests of every litigant and the system as a whole that there should be an end to litigation. People should put their full case before the court at trial and should not be allowed to have a second bite at the cherry without a very good reason indeed.

[49] Abdul Malik Ishak JCA (as he then was) in *Teoh Kien Peng & Anor* (*supra*) on similar issue, said at great length:

> [52] *Ladd v. Marshall* was decided in 1954. On 2.3.1970, the then Federal Court in *Lau Foo Sun v. Government of Malaysia* [1970] 1 LNS 56; [1970] 1 MLRA 219; [970] 2 MLJ 70 applied *Ladd v. Marshall*. In 1970, the Court of Appeal has not been set up. It was only in 1994 that the Court of Appeal was constituted. So, when the then Federal Court in *Lau Foo Sun v. Government of Malaysia* (*supra*) decided the issue of adducing further evidence, rule 7(3A) of the Rules of the Court of Appeal 1994 cannot be invoked for the simple reason that the Rules only came into force on 24.6.1994. We now have rule 7(3A) of the Rules of the Court of Appeal 1994 and we should vigorously apply it to the present appeal at hand instead of resorting wholesale to *Ladd v. Marshall*. A classic example

would be the case of *Lombard Natwest Factors Ltd. v. Sebastian Justin Arbis* [2000] BPIR 79 (Ch D) where the brief facts may be stated as follows. Natwest sought to re-open a bankruptcy hearing because new evidence had come to light. The question was whether the provisions of Rule 59.10 in Schedule 1 to the Civil Procedure Rules 1998 ("CPR") should be interpreted in the light of the overriding objective in Rule 1.2 of the CPR or in the light of the Court of Appeal decision of *Ladd v. Marshall*. The form of wording in Rule 59.10 in Schedule 1 to the CPR is exactly the same as that adjudicated upon in *Ladd v. Marshall*. Hart J, held that even though the two provisions were worded identically, it did not mean that the old interpretation had to apply. According to His Lordship, Rule 59.10 in Schedule 1 to the CPR had to be interpreted in the light of the overriding objective.

[53] It is now opportune to narrate the facts in *Ladd v. Marshall*. It is as follows. Ladd claimed repayment of a sum of £1,000 from Marshall. The latter denied receiving the money. At the trial, Ladd called Marshall's wife. In her evidence, she professed to know nothing of the transaction. The trial judge found that Ladd had not proved his case and gave judgment for Marshall. Some months after judgment had been entered, Marshall's wife obtained a divorce from her husband and thereupon she told Ladd's solicitors that she had given false evidence at the trial. Her excuse was that at the time of the trial she was living in Marshall's house and was afraid of telling the truth. Ladd appealed to the Court of Appeal, applying for a new trial, and moved for leave to adduce further evidence. Ladd's counsel argued that the relevant rule of court (then it was RSC Order 58, rule 4) was in wide terms, that there was a complete discretion in the court which ought not to be fettered to receive further evidence "if the justice of the case requires it". Unfortunately, the appeal failed. Denning LJ said that it was very rare that an application was made to the court for a new trial on the ground that a witness had told a lie. His Lordship added that the principles to be applied are the same as those always applied when fresh evidence was sought to be introduced. His Lordship then set out the three conditions as reproduced in the early part of this judgment.

[54] Of course, you cannot allow *Ladd v. Marshall* to stand in the way of doing justice in an individual case. I have said this earlier. When you see this happening, you will notice that the decided cases have been distinguished by the judges and when this happens you will see that the law has become more elaborate. This causes no difficulty because it illustrates the exercise of discretion by the judges to the particular facts of the case.

[50] It was the submission of learned counsel for Datuk Seri Mohd Shafie that since the piece of evidence arose subsequent to the appeal in which case, the application ought to be allowed under r. 7(3A) of the Rules of the Court of Appeal 1994 in that at the hearing before the High Court, the new evidence was not available to the party seeking to use it and that the new evidence, if admitted, would have had a determining influence upon the decision of the High Court.

[51] Upon hearing the parties, we find merit in the application in encl. 25 to admit fresh evidence. This piece of evidence is of relevance and assistance in this appeal and which was only available after the decision appealed against. The respondent's application in encl. 25 was therefore allowed.

[52] For ease of reference, we reproduce the fresh admitted evidence in the form of "Senarai Parti Yang Dianggotai Oleh Ahli Dewan Undangan Negeri Sabah Kelima Belas" with the covering letter, as follows:

Dewan Undangan Negeri Sabah
Aras 4, Bangunan Dewan Undangan Negeri Sabah
Peti Surat 11247
88813 Kota Kinabalu, Sabah, Malaysia.
Telefon: 088-424415/424405/424406/427533
Faks: 088-427333/439789
http://www.sabah.gov.my/dun

Rujukan : DUNS: 600-2/27(111)
Tarikh : 3 Oktober 2019

YBhg. Datuk Douglas Lind,
Advocate Roll No.75/1978
Lind Willie Wong & Chin,
Level 7, Wisma Great Eastern,
65, Jalan Gaya,
88000 KOTA KINABALU.

Faks: 088-213788

YBhg. Datuk,

RE: CIVIL APPEAL NO. S-01(NCvC)(A)-692-12-/2018
Tan Sri Musa Bin Haji Aman ... Appellant
vs
Tun Datuk Seri Panglima Haji Juhar Haji Mahiruddin ... 1st Respondent
Datuk Seri Shafie Bin Haji Apdal ... 2nd Respondent

Dengan hormatnya surat YBhg. Datuk rujukan: KDL/IIM-123(4)/DL/sw bertarikh 2 Oktober 2019 berhubung perkara di atas dirujuk.

2. Bersama ini dikemukakan maklumat parti yang dianggotai oleh Ahli Dewan Undangan Negeri Sabah Yang Kelima Belas seperti yang dikehendaki untuk rujukan dan simpanan YBhg. Datuk.

Sekian, terima kasih.

"BERKHIDMAT UNTUK NEGARA DENGAN BERSIH, CEKAP DAN AMANAH"

Saya yang menurut perintah,

(SHAFARUDDIN BIN HALIDE)
Setiausaha
Dewan Undangan Negeri Sabah

SENARAI PARTI YANG DIANGGOTAI OLEH AHLI DEWAN UNDANGAN NEGERI SABAH KELIMA BELAS		
KAWASAN	**NAMA/JAWATAN**	**PARTI DIANGGOTAI**
NI BANGGI	YB TUAN MOHAMMAD MOHAMARIN, PEMBANTU MENTERI PELAJARAN DAN INOVASI	WARISAN
N2 TANJONG KAPOR	YB TUAN CHONG CHEN BIN, PEMBANTU MENTERI PERDAGANGAN DAN PERINDUSTRIAN	WARISAN
N3 PITAS	YB DATUK BOLKIAH BIN ISMAIL	WARISAN
N4 MATUNGGONG	YB PUAN JULITA MAJUNGKI	PBS
N5 TANDEK	YB DATUK ANITA BARANTING	WARISAN
N6 TEMPASUK	YB DATUK HAJI MUSBAH HAJI JAMLI	WARISAN
N7 KADAMAIAN	YB DATUK EWON BENEDICK MENTERI PEMBANGUNAN LUAR BANDAR	UPKO
N8 USUKAN	YB DATUK JAPLIN BIN AKIM @ ABD HAMID	BERSATU (PPBM)
N9 TAMPARULI	YB DATUK JAHID JAHIM	PBS
N10 SULAMAN	YB DATUK SERI PANGLIMA HAJI HAJIJI HAJI NOOR	BERSATU (PPBM)
N11 KIULU	YB DATUK JONISTON BIN LUMAI @ BANGKUAI	PBS
N12 KARAMBUNAI	YB TUAN AZHAR BIN DATUK HAJI MATUSSIN, PEMBANTU MENTERI PERDAGANGAN DAN PERINDUSTRIAN	WARISAN
N13 INANAM	YB TUAN KENNY CHUA TECK HO PEMBANTU MENTERI KEWANGAN	PKR
14 LIKAS	YB TUAN TAN LEE FATT	DAP
N15 API-API	YB DATUK LIEW CHIN JIN @ CHRISTINA LIEW, TIMBALAN KETUA MENTERI /MENTERI PELANCONGAN, KEBUDAYAAN DAN ALAM SEKITAR	PKR
N16 LUYANG	YB TUAN PHOONG JIN ZHE	DAP
N17 TANJONG ARU	YB DATUK WONG HONG JUN @ JUNZ, MENTERI PERTANIAN DAN INDUSTRI MAKANAN	WARISAN
N18 PETAGAS	YB DATUK HAJI UDA BIN SULAI PEMBANTU MENTERI KEPADA MENTERI UNDANG-UNDANG DAN HAL EHWAL ANAK NEGERI	WARISAN

KAWASAN	NAMA/JAWATAN	PARTI DIANGGOTAI
N19 KAPAYAN	YB PUAN JANNIE LASIMBANG PEMBANTU MENTERI KEPADA MENTERI UNDANG-UNDANG DAN HAL EHWAL ANAK NEGERI	DAP
N20 MOYOG	YB PUAN JENIFER LASIMBANG PEMBANTU MENTERI PELAJARAN DAN INOVASI	WARISAN
N21 KAWANG	YB DATUK HAJI GULAMHAIDAR @ YUSOF BIN KHAN BAHADAR	BERSATU (PPBM)
N22 PANTAI MANIS	YB DATUK AIDI BIN HAJI MOKTAR MENTERI UNDANG-UNDANG DAN HAL EHWAL ANAK NEGERI	WARISAN
N23 BONGAWAN	YB DR DAUD BIN YUSOF PEMBANTU MENTERI PERTANIAN DAN INDUSTRI MAKANAN	WARISAN
N24 MEMBAKUT	YB DATUK HAJI MOHD ARIFIN BIN MOHD ARIF	BERSATU (PPBM)
N25 KLIAS	YB DATUK 1SNIN BIN HAJI ALIASNIH @ LIASNIH	BERSATU (PPBM)
N26 KUALA PENYU	YB DATUK LIMUS BIN JURY	UPKO
N27 LUMADAN	YB TUAN MATBALI MUSAH	BERSATU (PPBM)
N28 SINDUMIN	YB DATUK DR YUSOF BIN YACOB MENTERI PELAJARAN DAN INOVASI	WARISAN
N29 KUNDASANG	YB DATUK DR JOACHIM GUNSALAM	PBS
N30 KARANAAN	YB DATUK SERI PANGLIMA HAJI MASIDI MANJUN	BERSATU (PPBM)
N31 PAGINATAN	YB DATUK ABIDIN MADINGKIR	UPKO
N32 TAMBUNAN	YB DATUK DR JEFFREY G KITINGAN	STAR
N33 BINGKOR	YB TUAN ROBERT TAWIK @ NORDIN	STAR
N34 LIAWAN	YB TUAN RASININ BIN KOUTIS @ KAUTIS PEMBANTU MENTERI PEMBANGUNAN LUAR BANDAR	WARISAN
N35 MELALAP	YB DATUK PETER ANTHONY, MENTERI PEMBANGUNAN INFRASTRUKTUR	WARISAN
N36 KEMABONG	YB TUAN JAMAWI JAAFAR	WARISAN

KAWASAN	NAMA/JAWATAN	PARTI DIANGGOTAI
N37 SOOK	YB DATUK ELLRON ANGIN	STAR
N38 NABAWAN	YB DATUK BOBBEY AHFANG BIN SUAN	BERSATU (PPBM)
N39 SUGUT	YB DATUK JAMES BIN RATIB	UPKO
N40 LABUK	YB TUAN ABDUL RAHMAN BIN KONGKAWANG	WARISAN
N41 GUM-GUM	YB TUAN ARUNARNSIN BIN TAIB PEMBANTU MENTERI BELIA DAN SUKAN	WARISAN
N42 SUNGAI SIBUGA	YB TAN SRI DATUK SERI PANGLIMA MUSA HAJI AMAN	UMNO
N43 SEKONG	YB TUAN ARIFIN BIN ASGALI PEMBANTU MENTERI KEPADA KETUA MENTERI	WARISAN
N44 KARAMUNTING	YB TUAN HIEW VUN ZIN PEMBANTU MENTERI KERAJAAN TEMPATAN DAN PERUMAHAN	WARISAN
N45 ELOPURA	YB TUAN CALVIN CHONG KET KIUN	DAP
N46 TANJONG PAPAT	YB DATUK POON MING FUNG @ FRANKIE MENTERI BELIA DAN SUKAN	DAP
N47 KUAMUT	YB DATUK MASIUNG BANAH	WARISAN
N48 SUKAU	YB DATUK SADDI BIN ABDU RAHMAN	WARISAN
N49 TUNGKU	YB TUAN ASSAFFAL P ALIAN, PEMBANTU MENTERI PELANCONGAN, KEBUDAYAAN DAN ALAM SEKITAR	WARISAN
N50 LAHAD DATU	YB TUAN DUMI BIN PG MASDAL PEMBANTU MENTERI PEMBANGUNAN LUAR BANDAR	WARISAN
N51 KUNAK	YB PUAN NORAZLINAH B ARIF PEMBANTU MENTERI KESIHATAN DAN KESEJAHTERAAN RAKYAT	WARISAN
N52 SULABAYAN	YB DATUK DR HAJI JAUJAN BIN HAJI SAMBAKONG, TIMBALAN KETUA MENTERI/MENTERI KERAJAAN TEMPATAN & PERUMAHAN	WARISAN
N53 SENALLANG	YAB DATUK SERI PANGLIMA HAJI MOHD SHAFIE BIN HAJI APDAL, KETUA MENTERI/MENTERI KEWANGAN	WARISAN

KAWASAN	NAMA/JAWATAN	PARTI DIANGGOTAI
N54 BUGAYA	YB PUAN MANIS BUKA BINTI MOHD DARAH	WARISAN
N55 BALUNG	YB DATUK OSMAN JAMAL	WARISAN
N56 APAS	YB DATUK HAJI NIZAM DATUK HAJI ABU BAKAR TITINGAN	BERSATU (PPBM)
N57 SRI TANJONG	YB DATUK WONG SZE PHIN @ JIMMY PEMBANTU MENTERI KEPADA KETUA MENTERI	DAP
N58 MEROTAI	YB TUAN SARIFUDDIN BIN HATA, PEMBANTU MENTERI KEWANGAN	WARISAN
N59 TANJONG BATU	YB DATUK HAJAH HAMISA BINTI SAMAT	WARISAN
N60 SEBATIK	YB DATUK HAJI ABD MUIS BIN HAJI PICHO PEMBANTU MENTERI PEMBANGUNAN INFRASTRUKTUR	WARISAN
ADUN DILANTIK	YB DATUK SERI PANGLIMA WILFRED MADIUS TANGAU	UPKO
ADUN DILANTIK	YB TUAN TERRENCE SIAMBUN	WARISAN
ADUN DILANTIK	YB TUAN LORETTO S PADUA JR @ DAMIEN PADUA JR II	WARISAN
ADUN DILANTIK	YB TUAN JAFFARI BIN WALIAM	PKR
ADUN D1LANTIK	YB TUAN LOH EE ENG	DAP

[53] What can be distilled from the fresh evidence is that at the current standing, Tan Sri Musa's coalition party had only eight seats in the State Assembly including himself. They were as follows:

(i) N4 Matunggong - YB Puan Julita Majungki – PBS

(ii) N9 Tamparuli - YB Datuk Jahid Jahim – PBS

(iii) N11 Kiulu - YB Datuk Joniston bin Lumai @ Bangkuai – PBS

(iv) N29 Kundasang - YB Datuk Dr Joacim Gunsalam – PBS

(v) N32 Tambunan - YB Datuk Dr Jeffrey G. Kitingan – STAR

(vi) N33 Bingkor - YB Tuan Robert Tawik @ Nordin – STAR

(vii) N37 Sook - YB Datuk Ellron Angin – STAR

(viii) N42 Sungai Sibuga - YB Tan Sri Datuk Seri Panglima Musa Haji Aman – UMNO

Preliminary Objection

[54] On 25 November 2019, three days before the date fixed for the hearing of this appeal, counsel for Datuk Seri Mohd Shafie issued a notice to counsel for Tan Sri Musa that they on behalf of Datuk Seri Mohd Shafie would be raising a preliminary objection to the appeal on the ground that the appeal was not competent and that the appeal had become academic and the appeal be dismissed forthwith. The notice given by learned counsel was in the fo

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YOUR REFERENCE : FTA/TAF/MA/2018/137-Lit

OUR REFERENCE : KDL/IIIM-123(4)/DL/lw

(PLEASE QUOTE OUR REFERENCE IN REPLY)

Date : 25 November 2019

BY HAND

MESSRS. F. T. AHMAD & CO.
Advocates & Solicitors
Block J-06-2, Signature Office
KK Times Square
Off Coastal Highway
88100 Kota Kinabalu, Sabah.

Dear Sirs

Re: MAHKAMAH RAYUAN SIVIL NO. S-01(NCvC)(A)-692-12/2018
(Mahkamah Tinggi Kota Kinabalu Guaman No. BKI-24NCvC-56/8-2018 (HC2))

Tan Sri Musa Bin Haji Aman ... Appellant
And
Tun Datuk Seri Panglima Haji Juhar Haji Mahiruddin ... 1st Respondent
Datuk Seri Shafie Bin Haji Apdal ... 2nd Respondent

We act Datuk Seri Mohd. Shafie Bin Haji Apdal who is the 2nd Respondent in this appeal.

TAKE NOTICE that at the hearing of this appeal scheduled for 28th November 2019, we will on behalf of the 2nd Respondent be raising a "PRELIMINARY OBJECTION" to the appeal on the ground that it is "NOT COMPETENT" because the appeal has become "ACADEMIC" as the outcome of the appeal will have no effect at all the interests of either the Appellant or the 2nd Respondent and it would merely be an exercise in futility and the appeal be dismissed forthwith.

Thank you

Yours faithfully

DATUK DOUGLAS LIND
ADVOCATE ROLL NO. 75/1978

cc The Deputy Registrar of the Court of Appeal

cc The State Attorney General for the 1st Respondent

cc Client.

Branch Office: Lot 2 & 3, Level 2, Wisma Lazenda, Jalan Kemajuan, 87007 W. P. Labuan, Malaysia.
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[55] The respondents' application was made under O. 33 r. 2 of the Rules of Court 2012 which provides:

> O. 33 r. 2: The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

[56] We proceeded to hear submissions from both parties on the issue raised by learned counsel for Datuk Seri Mohd Shafie ie, that the appeal before us was incompetent and had become academic and that it ought to be struck out without hearing the merits of the appeals. The gist of learned counsel for the Datuk Seri Mohd Shafie's submissions on the preliminary objection was that the appeal was not competent as it had become academic because the outcome of the appeal would have no effect on either Tan Sri Musa or Datuk Seri Mohd Shafie based on the fresh evidence duly admitted by this court.

[57] Based on the letter dated 3 October 2019 from the Secretary of the State Legislative Assembly which we exhibited above, at best, Tan Sri Musa could only garner the support of the eight opposition members including himself. Whereas, Datuk Seri Mohd Shafie has the support of 52 Assemblymen including the nine Assemblymen from UMNO who had defected to Warisan and thus Datuk Seri Mohd Shafie have the support of more than two-thirds of the members of the State Legislative Assembly.

[58] Learned counsel further submitted that the State Legislative Assembly at its first sitting on 6 June 2018 after the GE-14, had passed a motion of confidence for Datuk Seri Mohd Shafie with a majority of 44 votes out of 59 Assemblymen that were present. Learned counsel argued that due to the wide difference in the support between Tan Sri Musa and Datuk Seri Mohd Shafie, even if Tan Sri Musa was successful in his appeal, the outcome will remain merely academic as it will have no effect at all on either party. The *status quo* remains and Datuk Seri Mohd Shafie would continue to be the CM as he has a large number of Assemblymen supporting him.

[59] Learned counsel further submitted that there will be no miscarriage of justice against Tan Sri Musa upon allowing the preliminary objection because it was clear that Tan Sri Musa had lost the confidence of the majority of the members of the State Legislative Assembly thereby triggered art. 7(1) of the Sabah State Constitution.

[60] Learned counsel also submitted that by virtue of art. 7(1) of the Sabah State Constitution, it was mandatory for Tan Sri Musa to tender the resignation of the Cabinet, including the CM himself and by his failure to do so, he is deemed to have vacated the office of the CM. Therefore, learned counsel argued that it was correct for the TYT to exercise his constitutional duty by appointing Datuk Seri Mohd Shafie as the CM on the night of 12 May 2018.

[61] Sabah State Attorney-General, Datuk Hajah Zaleha Rose Bte Datuk Haji Pandin (State AG), acting on behalf of the TYT supported the preliminary objection and adopted Datuk Douglas Lind's submission. The learned State AG emphasised that the dispute was no longer a live issue nor relevant and that the appointment of the CM was the prerogative of the TYT.

[62] In opposing the preliminary objection, learned counsel for Tan Sri Musa argued that the instant appeal before us is outside of art. 7(1) of the Sabah State Constitution and different from the *Perak*'s case. Learned counsel submitted that the TYT's act in appointing Datuk Seri Mohd Shafie was unconstitutional and the issue is very much alive.

Decision

[63] Let us start with discussing the issue on a declaratory judgment sought by Tan Sri Musa in his statement of claim. There is no doubt in our mind that the power of the court to make a declaratory judgment is discretionary. The court will not make a declaratory judgment when the issue in dispute is purely academic. The court should not be required to answer academic question or issue which is no longer a live issue. The apex court in *Husli Mok v. Superintendent Of Lands & Surveys & Anor* [2014] 9 CLJ 733; [2014] 6 MLJ 766 clearly stated this trite law at pp. 746 & 747 (CLJ); p. 777 (MLJ) as follows:

> [27] We shall now deal with question (2) posed in this appeal. We are of the view if question (1) is answered in the affirmative and the plaintiff's right to recovery of damages barred by limitation, the declarations sought for by the plaintiff would be futile. The grant of declaration is in the discretion of the court. The court will not act in vain and grant declarations that are of no utility or in regard to matters which are no longer 'live issue' or has become academic. In support of this proposition we would refer to the following passage of the judgment of Wan Adnan J (as he then was) in *Pedley v. Majlis Ugama Islam Pulau Pinang & Anor* [1990] 2 MLJ 307 at p 308 as follows:
>
> > The power of the Court to make a declaratory judgment is discretionary. The Court will not make a declaratory judgment when the question raised is purely academic. The Court should not be required 'to answer academic question' - *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417. Although the remedy by way of declaration is wide and flexible yet it will not be granted to a plaintiff whose claim is too indirect and unsubstantial and would not give him 'relief' in any real sense, that is relieve him of any liability or disadvantage or difficulty: *Thome Rural District Council v. Bunting* [1972] 1 All ER 439.

[64] In *Sun Life Assurance Co of Canada v. Fervis* [1944] 1 All ER 469, Viscount Simon LC, speaking for the House of Lords, said (at p. 470):

> I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the

respondent in any way. If the House undertook to do so, it would not be deciding an existing *lis* between the parties who are before it, but would merely by expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties.

[65] In *Ainsbury v. Millington* [1987] 1 All ER 929, Lord Bridge, having cited the passage by Viscount Simon LC above, said at pp. 930-931:

It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.

[66] In *Hutcheson v. Popdog Ltd* [2012] 2 All ER 711, Lord Neuberger MR laid down the three requirements which have to be satisfied before an appeal, which is academic as between the parties, be allowed to proceed. At p. 715 the Law Lord said this:

[15] Both the cases and general principle seem to suggest that, save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may (and I mean 'may') be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise in appropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated.

[67] In an earlier decision of the Court of Appeal in *Bowman v. Fels* [2005] 4 All ER 609, Brooke LJ held that in public law matters, such as the case before us, appeals which were academic between the parties would not be heard save for permitted exceptions such as when the appeal is in the public interest for the court to decide on an important and difficult point of law arising out of the interpretation of a recent statute.

[68] Back to our jurisdiction, in *Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors and Another Application* [1999] 1 CLJ 325; [1999] 1 MLJ 257, Edgar Joseph Jr FCJ, said at p. 335 (CLJ); p. 264 (MLJ):

Having said that, this court does not sit to decide abstract or academic or hypothetical question of law regarding which the parties are not in dispute. Thus, in *Ainsbury v. Millington* [1987] 1 All ER 929, Lord Bridge said this (at pp. 930-931):

> It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.

[69] In the most recent decision of the apex court in *Bar Council Malaysia v. Tun Dato' Seri Arifin Zakaria & Ors And Another Reference; Persatuan Peguam-peguam Muslim Malaysia (Intervener)* [2018] 10 CLJ 129 which involved the appointment of respondents as Chief Justice of Malaysia and President of the Court of Appeal after their mandatory retirement, respectively. The issue before the court was whether their appointments were valid and constitutional and whether the matter has been rendered academic when both the respondents issued their letters of resignation and the same were consented to by the Yang di-Pertuan Agong. The apex court in dismissing the references gave a very lucid judgment which merited some lengthy reproduction as follows:

> 52. The general position applies equally to constitutional questions. In *Bhewa & Another v. Government of Mauritius & Another* [1992] Lexis Citation 3959, the Privy Council declined to determine a question concerning the constitutionality of a statute in Mauritius. The question was rendered academic, for the effect of the impugned act had subsequently been reversed by another act. In light of the new act, which was brought to the attention of the Privy Council on the day of the hearing, the appellant's counsel "did not feel in a position to present any substantive argument in support of the appeal." In the circumstances, the Privy Council considered that "it would not be appropriate to make any order in the appeal either as to its disposed or as to costs."
>
> 53. The question before us is this. In view of the fundamental changes in the governance of the judiciary with the departure of the Second and Third Respondents, the stark issues as housed in the questions posed have now become blunted by consequential events.
>
> 54. It bears repeating that the illegality alleged has been superseded by subsequent events. As such, the subject matter of the dispute - the constitutionality of the judges holding their respective offices (2nd and 3rd Respondent) is no longer in existence. Their replacements have been made. What then is the dispute that needs to be resolved?
>
> 55. The outcome of the constitutional reference will not affect the positions of the parties at all. No order can be made to give effect to the issue. In other words, there is now no remedy that this court can order, to give effect to the Applicant's view on the constitutionality of the appointments.
>
> 56. The Applicants, the *amicus curiae* and the interveners contended that the questions raised in the case need to be answered, for they are not moot, that they are 'live' issues and that therefore they necessitate a judgment from this court.
>
> 57. Although it is not unusual for the court to hear cases which may have become academic or hypothetical, this discretion is to be exercised sparingly.

58. The authorities indicate that in such a case, the court has a narrow discretion to proceed, for it is to be exercised with caution. A

Public Law exception

59. One limited exception to the general rule is in relation to questions of public law. In *R v. Secretary of State for the Home Department ex p Salem* [1999] AC 450 at 456, Lord Slynn of Hadley held: B

> ... in a cause where there is an issue involving a public authority as to a question of public law, their Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a *lis* to be decided which directly affect the rights and obligations of the parties *inter se*. However the discretion to hear disputes must be exercised with caution, and academic appeals should not be heard "in the public interest for doing so." C

60. By way of example, features of academic cases suitable for determination include: (a) discrete point of statutory construction (b) a situation where it does not involve detailed considerations of fact and (c) a situation where there is a large number of similar cases which need to be resolved. D

61. This case clearly does not appear to fall within the *Salem* exception for public law matters.

62. In this case, as in *Salem*, "the factors are by no means straightforward and in other cases the problem of when a determination is made may depend on the precise factual context of each case." The factual matrix of the case was novel; no other similar controversy has arisen before or since. Following *Bhewa* (*supra*), especially if counsel chooses not to advance any submissions in light of the subsequent development, it would not be appropriate for the court to make a determination on the questions posed. E F

63. We agree with the Attorney General Chambers that the issues in the motion are academic and that a judgment needs to be issued by this court. We reiterate the view that it is not the function of the courts to decide hypothetical questions which do not impact on the parties before them. This point was well put by the Lord Justice Clerk (Thomson) in *Macnaughton v. Macnaughton Trustees* [1953] SC 387, 392: G

> Our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide *only live, practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The courts are neither a debating club nor an advisory bureau*. Just what is a live *practical question is not always easy to decide and must, in the long run, turn on the circumstances of the particular case*. H
>
> (emphasis added) I

64. The above view was endorsed by Lord Scott of Froscoe in *R (Rusbridge & Another) v. Attorney General* [2004] 1 A.C. 357, who said that "the valuable time of the courts should be spent on real issues." The Court does not act *in vacuo* nor does it act in vain. Shorn of the legal rhetoric, the fundamental purpose of the application was to ensure that the Second and Third Respondents whose appointment have been alleged to be unconstitutional was to be removed from the position, or for them to vacate their position with immediate effect.

65. The legal construction of the question posed was specially in that factual context. But as mentioned before both Second and Third Respondents have **since relinquished their post. And since matters have changed irrevocably by reason of their resignation**, it is no longer tenable for the court to answer the question posed because the factual substratum underlying the question posed no longer exists. Therefore the court would effectively be acting in a vacuum.

66. In fact in such a situation as this, where there is no more a live issue and where the *Salem* exceptions do not apply, the position taken by the Applicants, the intervener and *amicus curiae* is called into question.

67. In this, we decline to issue a judgment for there is no issue to be decided by us. The Second and Third Respondents have left their positions. The Applicants have nothing to fight for, because they have already achieved their purpose.

68. In this too, we echo the sentiment expressed by the House of Lords in *Ainsbury v. Millington (supra)* that it is the duty of counsel and solicitors in any pending appeal in publicly funded litigation (although this is not strictly publicly funded), that whenever an event occurs which arguably disposes of the *lis*, either to ensure that the appeal is withdrawn by consent or, if there is no agreement to that cause, to bring the facts promptly to the attention of the court, to seek directions. In this, the Applicants did nothing of the sort.

69. In this connection, "this court has inherent power to control its own process and it is entitled to bring arguments to a close when it is clear that nothing of value will be lost, by ending it." (*Attorney-General v. Scriven* 4 February 2000 unreported, C.A.).

[70] The position in India is no different. In *Loknath Padhan v. Birendra Kumar Sahu* AIR 1974 SC 505, the Supreme Court of India held on the same issue that it is well-settled practice recognised and followed in India that its decision one way or the other would have no impact on the position of the parties, it would be a waste of public time and indeed not a proper exercise of authority for the court to engage itself in deciding it. In his judgment, Justice Bagwati said:

... it would be clearly futile and meaningless for the court to decide an academic question, the answer to which would not affect the position of one party or the other. The court would not engage in a fruitless exercise. It would refuse to decide a question, unless it has a bearing on some right

> or liability in controversy between the parties. If the decision of a question would be wholly ineffectual so far as the parties are concerned, it would be not only unnecessary and pointless but also inexpedient to decide it and the court would properly decline to do so.
>
> The appellant too does not come to this court to know what the law is in this country on a hypothetical issue. The appellant wants his proposed amendments to be admitted. But, even if this court were to answer the question posed in a way that he would like this court to answer, still this court would not be able to make the order that he requires.

[71] In the appeal before us, as we alluded to earlier, learned counsel for Tan Sri Musa and Datuk Jahid in opposing the preliminary objection argued that the projected appeal should proceed as the matter was of public importance and that the issue is very much alive. We disagree with the learned counsel's argument because from the declaratory reliefs sought by the appellants which they are private law in nature even though important but had been overtaken by the subsequent event which rendered the matter academic. Even if Tan Sri Musa is successful with his appeal, the outcome will remain merely academic because Datuk Seri Mohd Shafie would still remain as CM because of the majority support he currently enjoys.

[72] Therefore, although the issues relating to who is the rightful CM of the Sabah State as raised in the projected appeal is significant, it is not of outstanding public importance because even if the projected appeal were to succeed, which is at best from Tan Sri Musa point of view, that will not make him the new CM again as he does not meet the threshold under art. 6(3) of the Sabah State Constitution. The learned judge has not erred when she refused the declaratory and injunctive reliefs sought by the appellant.

Conclusion

[73] For the reasons given, we accordingly upheld the preliminary objection raised by the respondent for the issues in dispute between the parties in the projected appeal were academic. Therefore, we dismissed both appeals with costs without considering the merits.